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IN THE

Supreme Court of the United States

October Term, 1958

No. 789

HUBERT A. EATON, *et al.*,

Petitioners,

—v.—

BOARD OF MANAGERS OF THE JAMES WALKER MEMORIAL HOSPITAL, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on November 29, 1958.

Citations to Opinions Below

The opinion of the Court of Appeals is printed in the appendix hereto, page 1a, *infra*, and is reported at 261 F. 2d 521. The opinion of the District Court herein is reprinted in the appendix at page 13a, and is reported at 164 F. Supp. 191.

Jurisdiction

The judgment of the Court of Appeals was entered on November 29, 1958. By order of the Chief Justice, time to

file petition for writ of certiorari was extended to and including March 23, 1959. The jurisdiction of this Court is invoked under 28 U. S. C., §1254.

Question Presented

Whether the complaint, which invoked the Fourteenth Amendment right to be free from racial discrimination, and which alleged substantial governmental support of defendant hospital, that it had been created by the City and County, was governed by a governmentally created board, and had other significant governmental contacts, was properly dismissed under the Federal Rules of Civil Procedure, where it was admitted that plaintiffs, Negro physicians, were excluded from practicing in said hospital solely because of race, or whether plaintiffs have stated a claim upon which relief can be granted sufficient to allow presentation of proof on the merits.

Statement

The complaint in this case demanded declaratory judgment and injunction and posed the following question:

> . . . whether the custom and practice of the defendants in denying, on account of race and color to plaintiffs and other qualified Negro physicians similarly situated the right to courtesy staff privileges, including the right to treat their patients when they are admitted to defendants hospital, the James Walker Memorial Hospital, Wilmington, North Carolina, is unconstitutional and void as being a violation to the Fourteenth Amendment to the Constitution of the United States (App. 2).*

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* App. refers to petitioners' appendix in the Court of Appeals.

The three plaintiffs herein are Negroes and physicians who reside and practice in Wilmington, North Carolina. The defendants are the Board of Managers of the James Walker Memorial Hospital, a body corporate under and by virtue of the laws of the State of North Carolina and in the complaint alleged to be a governmental instrumentality, the Secretary of the Board of Managers of said hospital, who as its chief administrative officer has overall control and management thereof, the City of Wilmington, North Carolina, and the County of New Hanover in which that City is located.

The complaint sets forth the professional qualifications of plaintiffs, including their education, training and experience, and that they have been denied, solely because of race, the right to treat their patients at the James Walker Memorial Hospital (App. 3, 4). It alleges certain contacts between the hospital and various arms of government, by virtue of which it is claimed that action of the hospital is state action in the sense that it is governed by the equal protection clause of the Fourteenth Amendment to the United States Constitution. These allegations, it may be noted at this point, are admitted both by motions to dismiss (App. 10, 11, 13) and by stipulation (App. 15).

In particular the allegations concerning state action consist of the following:

1. "Defendants, including defendant Hospital, have exercised the right of eminent domain . . . for expansion and maintenance of the said Hospital" (App. 6).

2. Defendants have received "large grants of money from the Federal Government for expansion and maintenance of the said Hospital" (App. 6).

3. That the hospital is on a tract of land which was purchased by the County and City of Wilmington in 1881 (App. 6, 55-57).

4. That the City and County held and used said hospital under the Will of James Walker "as a hospital for the treatment of the 'sick and afflicted'" (App. 6). The will directed (App. 38-40) that the hospital be constructed by monies to be derived from Mr. Walker's estate "and after the completion of the said Hospital my said Executors are hereby directed to deliver and turn over the same to the proper authorities of the City of Wilmington and the County of New Hanover, State of North Carolina, to be held and used by them and their successors as a Hospital for the treatment of the sick and afflicted" (App. 39).

5. That the County of Wilmington "did by deed transfer the land upon which was situated the James Walker Memorial Hospital to the Board of Managers of the James Walker Memorial Hospital in trust for the benefit of the said County and City" (App. 7) by a deed requiring the County and City "To HAVE AND TO HOLD the same in trust for the use of the Hospital aforesaid, so long as the same shall be used and maintained as a Hospital for the benefit of the County and City aforesaid, and in case of disuse or abandonment to revert to the said County and City as their interest respectively appear . . . " (App. 59-60).

6. That the board of the hospital was constituted by state statute, a majority of its members to be selected by the County and City, and that since its constitution it has been self perpetuating (App. 33-34).

7. The City "has provided financial support for the said James Walker Memorial Hospital by granting said Hospital exemption from payment of city taxes. . . . " (App. 5).

8. The "City has for many years prior to 1951 made direct annual contributions from its treasury for the support, maintenance and operation of said Hospital and that since the year 1951, the said City has made per diem contribution to said Hospital in payment of services rendered certain residents of the City of Wilmington, North Carolina" (App. 5).

9. "The County has provided financial support for the James Walker Memorial Hospital by granting said hospital exemption from payment of County taxes . . ." (App. 6).

10. The "County has for many years prior to 1951, made direct annual contributions from its treasury for the support, maintenance and operation of the said hospital; and that since the year 1951, the said County has made per diem contributions to said hospital in payment of services rendered certain residents of the County of New Hanover" (App. 6).

As noted above, each of the defendants filed a motion to dismiss under Rule 12 (App. 10, 11, 13). The existence of certain statutes was stipulated by counsel for both sides and a tabular list of funds paid over by the County and City between 1952 and 1957 was also stipulated as true. These funds totaled about 4% of the hospital's income (App. 28). It also was stipulated that none of the original members of the board were on the board at the time plaintiff applied (App. 15). The Mayor submitted an affidavit relating that the city does not contribute any financial support to the hospital but charges it for water and sewerage (App. 17). Other affidavits were submitted concerning City and County payments subsequent to 1953 (Appee. 1, 2, 4).*

* Appee. refers to respondents (appellee's) appendix in the Court of Appeals.

Reviewing the facts and the law the District Court held on defendants' motion to dismiss under Rule 12 for lack of federal jurisdiction (App. 18) "that for the lack of jurisdiction the complaint must be dismissed . . . ." (App. 30). The Court of Appeals affirmed, 261 F. 2d 521 (4th Cir. 1958).

REASONS FOR ALLOWANCE OF THE WRIT

I

Under the Federal Rules of Civil Procedure dismissal under Rule 12 was erroneous.

This case at this stage involves essentially a relatively narrow issue: whether the district court should have granted the motion "to dismiss under Rule 12 [of the Federal Rules of Civil Procedure] for lack of federal jurisdiction," 164 F. Supp. at 192. Petitioners contend that under the liberal provisions of the Federal Rules they stated enough in their complaint to have permitted them to go to trial and make their proof. As stated in *Conley v. Gibson*, 355 U. S. 41, it is "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U. S. at 45-46. And as stated further in that case "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 47. For "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive

to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id.* at 48.

Nor should it matter as here that the motion to dismiss particularly alleged lack of jurisdiction. For jurisdiction, in the sense that it was an issue here, was co-extensive with the issue posed by the merits: There was no jurisdiction, it was held, because the hospital in question was not a governmental instrumentality. But whether the hospital was a governmental instrumentality or not was the main substantive question in the case. The decision of this question depended upon the nature and extent of the hospital's contacts with the State,[1] something which could

[1] This Court, of course, has not expressed any definitive formula concerning what constitutes state action under the Fourteenth Amendment. The cases indicate that any given determination may depend upon a full exposition of what constitutes the nexus between the alleged state instrumentality, and the government proper. See, e.g., *American Communications* v. *Douds*, 339 U. S. 382, 401 (1950) ("... when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." And see *Marsh* v. *Alabama*, 326 U. S. 501 (1946) (company town; claim of free speech upheld against charge of trespass); *Dorsey* v. *Stuyvesant Town*, 299 N. Y. 512, 87 N. E. 2nd 541 (1949) (state aided urban redevelopment; insufficient state action) cert. den. 339 U. S. 981 (1950); *Steele* v. *Louisville and N. R.R. Co.*, 323 U. S. 192 (1944) (Railway Labor Act held to require fair representation, forbid racial discrimination); *Betts* v. *Easely*, 161 Kan. 459, 169 P. 2d 831 (1946) (union held governmental entity); *Williams* v. *United States*, 341 U. S. 97 (1951) (private detective qualified as special police officer; state action); *Derrington* v. *Plummer*, 240 F. 2d 922 (5th Cir. 1956) (injunction issued against county's lessee); Clark, Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard, 66 Yale L. J. 979 (1957); Horowitz, The Misleading Search for "State Action" Under the Fourteenth Amendment, 37 Calif. L. Rev. 208 (1957).

only be developed by the proof. Plaintiffs submit they were not obligated to plead except in general terms. And they should have been permitted, it is respectfully submitted, to adduce detailed proof to substantiate their general allegations.

The general allegations which petitioner made were adequate to permit detailed material proof to be made at the trial. For example, it should have been pertinent for petitioner to present proof of the extent to which and the manner in which the hospital exercised the right of eminent domain (App. 6). Moreover, there is an allegation of the complaint, admitted for purposes of the motion to dismiss, that defendants have received large grants of money from the federal government for expansion and maintenance of the said hospital (App. 6). It is difficult to see how the motion to dismiss could have been granted without knowing how much money was given and in what manner and under what conditions. It is noteworthy that neither of the opinions below so much as mentions the matter of federal contribution.

It is further alleged that the City and County, by means of a reverter clause, require the Board of Managers to maintain the property as a hospital. This reverter clause, however, concerns only part of the property and it would bear upon the entire picture to know the fiscal significance of this requirement and its meaning for the operation of the hospital as a whole. Moreover, it has been alleged that the County and City have over the years provided financial support for said hospital. It very well might make a difference for the ultimate result if the court knew how much of said financial aid was for capital construction which now is a part of the hospital and how much was expended in day-to-day operation and is, in a sense, no longer a part of the hospital.

In short, on the motion to dismiss none of these, nor any other of the multitude of facts which might have been developed upon a trial, were elicited. The purpose of a complaint is not to plead such details but to state a claim upon which relief can be granted in support of which such details may be marshalled.

Petitioners here note certain public records which are only part of the evidence which may be produced in support of petitioner's general allegations. These are referred to merely as an example of the injustice which is done to the notice pleading concept of the Federal Rules by cutting off proof when a claim is well stated in general terms:

1. The 1943-44 Annual Report of the City of Wilmington, North Carolina, states at page 30:[2]

> James Walker Memorial Hospital
> City's Contribution $21,000
>
> Located at Dickinson and Red Cross Streets, this general, nonprofit hospital serves the greater portion of Wilmington's white population as well as some of the negro population. A new addition, financed by federal funds at a cost of $508,000, was placed in service in March, 1944, to bring the total number of beds available for patients to 300.[3]

2. Moreover, in a Petition for Condemnation in the Superior Court of New Hanover County, State of North Carolina, filed by the Board of Managers of said Hospital against Kirby C. Sidbury and Wife on April 28, 1942 to condemn land taken for said half-million dollar addition

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[2] A copy of this Report is being deposited with this petition.

[3] The original file concerning this federal grant is a public document, now on microfilm, held by the Housing and Home Finance Agency, Office of the Administrator, Records Management Branch, FWA Project Docket No. 31-127.

the Hospital alleged that it was "a municipal corporation, a public body and body corporate and politic . . ." Said petition for condemnation was granted by final judgment in said Superior Court on December 5, 1944, the judgment reciting that the petitioner "is a public body, a body corporate and politic . . ."[4]

3. There is also a public record of the fact that certain costs for capital construction have been paid for by the City and County in the Hospital's complaint at page 6 of the Record of *Board of Managers of the James Walker Memorial Hospital of Wilmington* v. *City of Wilmington and New Hanover County*, 237 N. C. 179, 74 S. E. 2d 749, to which opinion the District Court (Appendix hereto, 19a) and the Court of Appeals (Appendix hereto, 4a) referred:

> The North wing referred to above cost approximately $100,000 all told, of which the government contributed $40,000 and the City of Wilmington and the County of New Hanover paid, beginning the first of the fiscal year—the first of July, 1937,—$10,000 each for three years, making $60,000 all told, in addition to their regular appropriations of $15,000 each.

As stated above these references to public documents are made solely for the purpose of demonstrating part of the proof that would have been possible at a trial on the merits. But notwithstanding petitioners' substantial general allegations they were not permitted to go to such a trial.

On March 9, 1959, this Court handed down an order highly suggestive of what should be a proper disposition of this

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[4] A copy of the Petition for Condemnation and the Final Judgment are deposited along with this Petition.

cause. In passing on petition for writ of certiorari in *Oliphant* v. *Brotherhood of Locomotive Firemen and Enginemen*, 262 F. 2d 359 (6th Cir. 1958) this Court ruled that "in view of the abstract context in which the questions sought to be raised are presented by this record, the petition for writ of certiorari is denied." 27 U. S. L. Wk. 3249. In the *Oliphant* case, however, a "detailed record," 265 F. 2d at 361, had been made. Since plaintiffs therein had made such a record, which nonetheless failed to remove the issues therein from the level of abstraction, no further proceedings were, it seems, warranted. In the instant case, however, petitioners are in an entirely converse position. Petitioners herein *have not been permitted* to present the case in a manner sufficiently concrete to pose the highly important constitutional questions involved. Instead, petitioners have been dismissed on the basis of an abstract record.

II

The issue presented is one of the highest importance.

Discrimination against Negro physicians generally, and especially by governmental institutions, raises a question of the gravest national importance. The problem is not one merely of the economic boycott practiced against such physicians, as in this case where Negro patients are permitted to use the hospital in question, but must accept a white physician. As stated in a recent scholarly study of the subject conducted under the auspices of the Commonwealth Fund,

> . . . medicine is not simply a matter of individual patients who seek out physicians according to whim or convenience. Modern medicine is practiced in a complicated set of institutions—hospitals, clinics, pub-

lic health agencies. The physician's career involves finding a place in the system; the patient's career as a consumer of medical services likewise involves access to hospitals, clinics, and other agencies, and his association with various social groups—unions, employers, the armed forces, schools—which connect him with health services and insurance schemes. The system, operating at its best, sends the patient on from his first contact to whatever physicians or agencies can best handle his case; it also allows the physician, as he develops, to move towards those places in the system where he can best join his personal bent and ambition with maximum service.[5]

Because Negro physicians are so often excluded from the main stream of medical development they have increasingly in recent years eschewed practice in the South. It is shocking that notwithstanding the increase in Negro population in major southern cities the absolute number of Negro physicians in such cities is decreasing.[6] This not only affects the quantity of medical care available to the Negro community, but as indicated above, seriously affects the quality. For as Reitzes has written:

> . . . The most important single element in the continued education of physicians is affiliation with a hospital. The nature of the affiliations and the type of hospital with which a physician is affiliated is probably the best single index of his ability to keep abreast of good medical practice.[7]

Reitzes quotes a Negro physician, as follows, in the ensuing passage:

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[5] Reitzes, Negroes and Medicine xxx (1958).

[6] *Id.* at 272, 295, 316.

[7] *Id.* at 275.

. . . One of the Negro physicians stated that being excluded from the stream of medical knowledge in Atlanta made the Negro physician less competent than the white physician. He expressed his resentment and bitterness as follows:

> All Negro doctors here suffer from being cut off from the vital source of information—being with a good staff, and having the association and conferences of an able staff. The young doctors suffer from this as well as the older ones. . . . A doctor so deprived dies at the root. . . . White doctors my age and with my experience will rub shoulders with their superiors.[8]

In view of the fact that the Board of Managers of hospital here involved was, as indicated by the record, appointed by statute to consist of a majority of governmental officers, it appears unquestionable that that board was at the time of its appointment a governmental board. Since subsequent appointees to the board were appointed by the board itself, they were appointees of a governmental body and the case should seem squarely to fall under the first *Girard Trust* decision, 353 U. S. 230. For just as Girard College was managed by a municipal board, so the board in this case started out as a municipal board. It cannot seriously be urged that the death of the original members whose replacements were *selected by the board* made it any less a governmental entity. The *Oliphant* case, however, indicates that it is the view of this Court that questions of this sort should not be decided as abstractions, but on the basis of a complete record. Therefore petitioners respect-

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[8] *Ibid.* And see 49 Journal of the National Medical Association, 272, 352, 429 (1957) (setting forth reports on discrimination in hospitals throughout the nation).

fully submit that on the authority of the *Oliphant* case and *Conley* v. *Gibson*, *supra*; the judgment below should be vacated and petitioners permitted to make their proof.

CONCLUSION

Wherefore for the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOURTH CIRCUIT

(Argued Oct. 24, 1958 Decided Nov. 29, 1958.)

HUBERT A. EATON, DANIEL C. ROANE, and SAMUEL JAMES GRAY,

Appellants,

—v.—

BOARD OF MANAGERS OF THE JAMES WALKER MEMORIAL HOSPITAL, a body corporate, Alan A. Marshall, Chairman, H. E. Hamilton, Secretary of the Board of Managers of the James Walker Memorial Hospital, the City of Wilmington, North Carolina, Dan D. Cameron, Mayor, and the County of New Hanover, North Carolina, Ralph T. Harton, Chairman of County Commissioners,

Appellees.

SOPER, *Circuit Judge*:

The question in this case is whether certain Negro physicians practicing in Wilmington, North Carolina, are entitled to a declaratory judgment that they may not be excluded from courtesy staff privileges at the James Walker Memorial Hospital in that city solely on account of their race or color. The suit was brought by three physicians against the Board of Managers of the hospital, the City of Wilmington, and the County of New Hanover. Federal jurisdiction is based on the theory that the Board of Managers of the hospital, a corporation created by an act of the

General Assembly of North Carolina, is an instrumentality of the City of Wilmington and the County of New Hanover and as such is an agency of the State of North Carolina, which is prohibited by the first section of the Fourteenth Amendment to the Federal Constitution from denying to any person within its jurisdiction the equal protection of the laws. Jurisdiction is also based on the civil rights statutes, 42 U. S. C. A. §§1981, 1983, which furnish redress for persons who are deprived of their constitutional rights under color of any State statute or usage.

The defendants filed a motion to dismiss the complaint on the ground that the hospital is a private corporation not subject to State control, and hence the discriminatory treatment complained of can not be regarded as State action cognizable in a Federal court. The District Judge being of the opinion (164 F. Supp. 191) that this position was sustained by the undisputed facts set forth in the pleadings, stipulation and affidavits of the parties, dismissed the complaint.

The City of Wilmington and the County of New Hanover were authorized by Chapter 23 of the Public Laws of North Carolina of 1881, to establish and maintain a hospital and accordingly acquired land, erected a building thereon and established a hospital under the control of the Board of Managers of the City Hospital of Wilmington. In 1900, James Walker, a charitable citizen of Wilmington, furnished funds to build a modern hospital on the site of the City Hospital, and the old building was razed and construction of the new building was begun. It was completed on July 19, 1901, after Mr. Walker's death. He specified in his will that his executors should provide such moneys as were necessary for the completion of the building and should deliver and turn it over to the proper authorities of the City and of the County to be held and used by them as a hospital for the sick and afflicted.

As a result of this benefaction the Board of Managers of the James Walker Memorial Hospital was chartered by Chapter 12 of the Private Laws of North Carolina of 1901. This statute noted the liberality of the donor in providing a modern hospital for the maintenance of the sick and infirm poor who might become a charge upon the City and County, as well as for other persons, and declared that it was desirable that the management of the hospital be removed as far as possible from the control of local municipal authorities, subject to changing political conditions, and to that end chartered the hospital as a body corporate, provided for the selection of the individuals to constitute the original Board of Managers and made them a self-perpetuating body empowered to succeed to the powers and duties of the Board of Managers of the City Hospital after the new hospital had been turned over to and accepted by the City and County. Upon the completion of the building in 1901, the City and County conveyed the tract of land upon which it stood to the new Board of Managers of the hospital to hold in trust for the use of the hospital so long as it should be maintained as such for the benefit of the City and County, with reverter to the City and County in case of its disuse or abandonment. Subsequently additional land was acquired and additional buildings were erected by the Board of Managers.

The hospital has been operated under the authority of this Board of Managers since its charter was granted in 1901. In that charter it was stipulated that New Hanover County should provide the sum of $4,800 annually and the City of Wilmington $3,200 annually, to be placed in the hands of the Board of Managers of the hospital for the maintenance and medical care of the sick and infirm poor admitted thereto. Subsequent acts of the General Assembly, passed in 1907, 1915, 1937, 1939, and 1951, authorized various appropriations to be made for these purposes by

the City and County. All of these provisions, however, were declared to be unconstitutional by the Supreme Court of North Carolina in *Board of Managers of the James Walker Memorial Hospital of Wilmington* v. *City of Wilmington*, 1953, 237 N. C. 179, 74 S. E. 2d 749, in which the hospital sought a declaratory judgment adjudging the rights of the hospital to support from the City and County for the care of their sick and indigent. The court held that the appropriations for the hospital contained in the acts of 1901, 1907 and 1915 were invalid since the support of the hospital was not a necessary governmental expense and had not been approved by a majority of the qualified voters of the area, which is a prerequisite to the validity of an appropriation for an unnecessary governmental expense under Article VII, Section 7, of the State Constitution. The provisions for the payment of moneys to the hospital under the acts of 1937, 1939 and 1951 were also held invalid on the ground that they contravened the provisions of Article II, Section 29, of the State Constitution, adopted by the vote of the people of the State in 1916, which prohibited the passage of any local act relating to health.

The Supreme Court of North Carolina, however, pointed out in the cited case that the General Assembly of the State has power to authorize the governing body of any city or county to contract with the hospital for the medical care and hospitalization of the sick and poor of the area. Such a statute had previously been enacted for certain other towns and counties, and a similar act, applicable to the City and County in this case, was passed by the General Assembly of North Carolina, in Chapter 878 of the acts of 1953, G. S. §153-176.1, under which funds have been paid to the James Walker Memorial Hospital by the City and County under contract. The amounts thus paid and the total cash revenues of the hospital from 1952 to 1957 were as follows:

Year	Receipts City of Wilmington & County of New Hanover	Total All Cash Receipts
1952	$24,149.60	$ 922,061.78
1953	21,672.75	974,520.02
1954	60,867.32	1,081,903.33
1955	46,285.40	1,081,144.80
1956	64,804.36	1,228,403.34
1957	60,271.05	1,412,509.56

At the time of the trial of the suit the City did not have a contract with the hospital and provided no revenue to it, but the County operated under a contract dated May 6, 1957, for the care of certified indigent patients whereby it paid a specified per diem, which amounted to $16 per day per patient. The per diem cost was between $18 and $19.

On March 19, 1955, the plaintiffs applied for staff privileges at the hospital, which consisted of allowing the use of private rooms and pay wards for the patients of physicians. The applications were denied, and for the purpose of this action it is conceded that the applications were properly made but were denied by the Board of Managers solely on account of the race of the applicants. The plaintiffs argue that this action of the Board amounts to action by the State which the Federal court has power to interdict. They rest their contention mainly upon the following circumstances:

1. The establishment of the original hospital on the present site and the appropriation of certain moneys for its maintenance by the City and County under authority of Chapter 23 of the act of the General Assembly of North Carolina, 1881.

2. The operation of the hospital by the City and County thereafter until 1901.

3. The declarations in Chapter 12 of the act of 1901, incorporating the James Walker Memorial Hospital, that

the City and County had been provided with a modern hospital for the care of the sick and infirm poor of the locality and that the City and County should appropriate certain moneys annually for the maintenance of the hospital, and also that the Board of Managers named in the act should succeed to all the powers and duties of the Board of Managers of the former City Hospital as soon as the new building was completed and turned over to the City and County and accepted by them.

4. The declaration in the will of James Walker that after the completion of the new hospital his executors should deliver and turn it over to the authorities of the City and County to be held and used by them as a hospital for the treatment of the sick and infirm.

5. The provisions of the deed by which the site of the hospital was conveyed by the City and County to the Board of Managers of the James Walker Memorial Hospital in 1901, in trust for the use of the hospital so long as it should be maintained for the benefit of the City and County, with reverter to the City and County in case of disuse or abandonment.

6. The substantial appropriations for the support and maintenance of the hospital by the City and County under the authority of acts of the General Assembly between 1907 and 1951. It is said that these appropriations were made to carry out the provisions of Article XI, Section 7, of the State Constitution, which declares the duty of the General Assembly to make beneficent provision for the poor and unfortunate and to appoint a Board of Public Charities to supervise all State charitable and penal institutions.

With respect to the decision in *Board of Managers of the James Walker Memorial Hospital of Wilmington v. City of Wilmington, supra,* it is said that the court did not

declare it beyond the power of the State to make appropriations for the maintenance of a hospital but merely held that the appropriations referred to were invalid because they had not been made in the manner prescribed by the State Constitution; and hence the decision may not be taken as authority for the proposition that the hospital is not an instrumentality of the State.

With respect to the act of 1901 creating the new hospital corporation and the deed of 1901 conveying to it the site of the hospital, it is contended that the City and County were thereby made the beneficiaries of the trust and the Board of Managers of the hospital was made the trustee and an agency of the State subject to the provisions of the Federal Constitution. Reference is made to *Commonwealth of Pennsylvania* v. *Board of Directors of City Trusts of City of Philadelphia*, 353 U. S. 230, 77 S. Ct. 806, 1 L. Ed. 2d 792, where it was held that the managing board of Girard College was made an agency of the State by an act of the Pennsylvania Legislature and therefore could not exclude Negro children as directed by the will of the founder.

Finally, it is contended, on the authority of our decision in *Kerr* v. *Enoch Pratt Free Library of Baltimore City*, 4 Cir., 149 F. 2d 212, that the establishment of the Board of Managers of the James Walker Memorial Hospital, as an independent self-perpetuating body by the act of North Carolina Legislature in 1901, is not inconsistent with its status as an instrumentality of the State. It is emphasized that in the cited case we held that the Board of Trustees of the Library was an agency of the State of Maryland although it had been given control of the institution with the power of self-perpetuation by an act of the Maryland Legislature.

The plaintiffs rightfully confine their effort on this appeal to showing that the hospital is an instrumentality of

the State. They do not argue that the exclusion of qualified physicians solely because of their race from an institution devoted to the care of the sick is indefensible, as they might well do if this court was the proper forum to determine the ethical quality of the action. As a Federal court we are powerless to take into account this aspect of the case. We may not interfere unless there is State action which offends the Federal Constitution. From this viewpoint we find no error in the decision of the District Court for the facts clearly show that when the present suit was brought, and for years before, the hospital was not an instrumentality of the State but a corporation managed and operated by an independent board free from State control.

This has not always been the case. In 1881, when the hospital was established, and thereafter during the period ending in 1901, when it was supported and operated by municipal authority, it might well have been described as a State agency even though the funds for its operation had been illegally appropriated by the municipalities. But in that year a basic change took place when, taking advantage of the beneficence of Mr. Walker, the City and County conveyed the land on which the old building stood to the Board of Trustees of the James Walker Memorial Hospital, a new corporation created by an act of legislature with full powers of management and self-perpetuation. At that time a new building was erected on the site with funds provided by the benefactor. It would seem from the evidence that the hospital then ceased to be a public agency, although in the subsequent years until 1951 it received certain financial support from the City and County, the amount of which the record before us does not reveal. Any doubt on this point vanished in 1952 and 1953, when annual appropriations came to an end as the result of the decision of the Supreme Court of the State, and patients sent to the hospital by the local governments were treated and paid for

under contract on a per diem basis. It is beyond dispute that from that time on the civic authorities have had no share in the operation of the hospital and the Board of Managers have been in full control.

This conclusion is not precluded by the terms of the deed through which the corporation gained title to the land upon express trust to operate the hospital for the benefit of the City and County. A very similar situation was before the Supreme Court of the United States in *Board of Trustees of Vincennes University* v. *State of Indiana*, 14 How. 268, 14 L. Ed. 416, where it was held that a grant of public land by an act of Congress to the Board of Trustees of the University did not make the Board a public corporation. The Court said, 14 How. at pages 276-277:

> "• • • The corporators were vested with all the necessary powers to carry out the trust. And for the purposes of the trust, the title became vested in them, as soon as they acquired a capacity to receive it. This corporation had no political powers, and could, in no legal sense, be considered as officers of the State. They were not appointed by the State. Their perpetuity depended upon the exercise of their own functions; and they were no more responsible for the performance of their duties, than other corporations established by the State to execute private trust.
>
> "So far as regards the trust confided to the complainants, there is nothing which, by construction, can make it a public corporation. • • •"

The course of the decision in the case of Girard College also illustrates the point.[1] In *Commonwealth of Pennsyl-*

[1] For an interesting discussion of this case by Elias Clark, see Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard, 66 Yale L.J. 979.

vania v. *Board of Directors of City Trusts of City of Philadelphia*, 353 U. S. 230, 77 S. Ct. 806, 1 L. Ed. 2d 792, the Supreme Court held that the exclusion of Negro boys from Girard College violated the Fourteenth Amendment although the college was established with funds provided under the will of Stephen Girard, which directed that admissions be limited to white male orphans. The will named the City of Philadelphia as trustee but subsequently, and for a long period of years before the institution of the suit, the trust had been administered by the Board of Directors of City Trusts of Philadelphia, a body created by an act of the Pennsylvania Legislature. The Court held that under the terms of the statute the Board was an agency of the city and therefore the exclusion of Negro boys was unconstitutional. After this decision the Board was removed as trustee and the college was turned over to private trustees under an order of the Orphans' Court of Philadelphia and the restriction of the college to white students was continued. On appeal to the Supreme Court of Pennsylvania it was held that this procedure was not inconsistent with the mandate of the Supreme Court of the United States and did not violate the Fourteenth Amendment. *In re Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844. The case was then appealed to the Supreme Court of the United States, which granted a motion to dismiss the appeal and also, treating the case as a petition for writ of certiorari, denied the writ. Later, on October 13, 1958, reconsideration of this decision was denied, 79 S. Ct. 14.

The State Supreme Court pointed out that the Supreme Court of the United States based its decision in 1957 only on the ground that the managing board then in control of the college had been constituted an agency of the State by the enabling act and was therefore subject to the Fourteenth Amendment; but that the new board thereafter set

up by the Orphans' Court of Philadelphia, being composed of private citizens, was not a State agency and was therefore free to carry out the terms of the Girard will. The court held that the inability of the old Board to discriminate in the admission of students to the college affected the trustee and not the trust and that it was within the power of the Orphans' Court to substitute a new trustee in order to effectuate the charitable purposes of the testator. The court also held that the removal of the old and the substitution of new trustees by the court did not constitute State action within the scope of the Amendment; and it rejected the theory that State action is inherent in charitable trusts generally even if they are not administered by an agency of the State. We find no decision to the contrary.

The plaintiffs contend that the pending case is indistinguishable from our decision in *Kerr* v. *Enoch Pratt Free Library of Baltimore City*, 149 F. 2d 212, where we held that the Board of Trustees of the Library was a City agency notwithstanding the fact that its charter provided that it should be managed by a private board of trustees created by the donor and clothed with power to appoint their successors. In our view the cases are clearly distinguishable. The similarity between them is confined to the one circumstance: that in each instance a self-perpetuating governing body had been placed in charge by an act of legislature in compliance with the wishes of the donor. The distinguishing features, on the other hand, are decisive. The Library was completely owned and largely supported from the beginning by the City and at the time the suit was brought it was occupying a modern building erected by the City on land owned by the City and, more importantly, substantially all of the revenues of the institution were derived from the City in the form of budgetary appropriations. In short, it was shown that the Library was so completely subsidized by the City that in practical

effect its operations were subject to the City's control. In the pending case, as we have shown, the hospital is neither owned nor controlled by the municipalities and the revenues derived from them on a contract basis amount to less than 4½ per cent of its total income.

Affirmed.

UNITED STATES DISTRICT COURT

E. D. North Carolina

Wilmington Division

Civ. No. 700

June 24, 1958

Hubert A. Eaton, Daniel C. Roane and Samuel James Gray,

Plaintiffs,

—v.—

Board of Managers of the James Walker Memorial Hospital, a body corporate; Alan A. Marshall, Chairman; H. E. Hamilton, Secretary of the Board of Managers of the James Walker Memorial Hospital; The City of Wilmington, North Carolina, Dan D. Cameron, Mayor; and the County of New Hanover, North Carolina, Ralph T. Horton, Chairman of County Commissioners,

Defendants.

Gilliam, *District Judge*:

The instant suit is brought by three Negro doctors for themselves and for other Negro doctors, as a class, for the purpose of obtaining admission to practice medicine at James Walker Memorial Hospital on what is known as the "Courtesy Staff." The City of Wilmington and the County of New Hanover are made parties defendant in addition to the Hospital's Board of Managers and H. E. Hamilton who is Secretary of the Board. The defendants move to dismiss under Rule 12, Fed. Rules Civ. Proc. 28 U. S. C. A. for lack of federal jurisdiction. The facts of

the case, as determined by pleadings and affidavits, appear to be as follows:

By virtue of Chapter 23 of the Public Laws of the North Carolina General Assembly of 1881, the City of Wilmington and the County of New Hanover were authorized to establish and maintain a hospital. Pursuant to this authorization land was acquired and the City Hospital of Wilmington became existent, subsequent expenses relating thereto being borne 40 p rcent by the City and 60 percent by the County.

In 1900 Mr. James Walker offered to build a modern hospital on the property then owned by the City and County and occupied by the City Hospital of Wilmington. The building used by the latter institution was removed, and construction of the new hospital was begun. The new building was finished after Mr. Walker's death and under the direction of his will.

As a result of Mr. Walker's offer, the defendant, Board of Managers of James Walker Memorial Hospital of the City of Wilmington, North Carolina, was chartered by the North Carolina legislature under Chapter 12 of the Private Laws of 1901. The purpose of this private law, as stated in its preamble, was to provide for the management of a hospital in New Hanover County and Wilmington, N. C., which hospital had been built with funds provided by one James Walker to provide for the maintenance and medical care of sick and infirm poor persons who might from time to time become chargeable to the charity of the City and County, and to provide for other persons who might be admitted. The charter further provided that it was desirable, and that the purpose of the act was to remove the management of the hospital as far as possible from the vicissitudes which generally result when such an institution is left in control of local municipal authorities. The act

further declared that it was the purpose to provide for the permanent maintenance of the hospital by said City and County. To this end the hospital was chartered as a body corporate with all the rights and privileges conferred upon corporations under law. The original Board of Managers of the hospital was appointed pursuant to this act. Three were elected by the Board of Commissioners of New Hanover County; two were elected by the Board of Aldermen of the City of Wilmington and four members were selected by Mr. James Walker. This board is self-perpetuating and has continued as such since its inception.

Upon the completion of the new James Walker Memorial Hospital building on July 19, 1901, the City of Wilmington and the County of New Hanover conveyed to the Board of Managers of James Walker Memorial Hospital of the City of Wilmington, N. C. a tract of land consisting of all of Block 227 of the City of Wilmington to hold "so long as the same shall be used and maintained as a hospital for the benefit of the County and City aforesaid, and in case of disuse or abandonment to revert to the said City and County as their interests respectively appear . . . ." The deed specifically refers to the fact that the General Assembly has created and established a hospital under the supervision of a Board of Managers and the conveyance states that it is for the purpose of removing the management of the hospital as far as possible from the vicissitudes which generally result when such an institution is left under the control of municipal authorities. The effect of this deed was to convey to the original Board of Managers of James Walker Memorial Hospital of the City of Wilmington, N. C., a separate corporation, all of Block 227 of the City of Wilmington, N. C., which had on it a building which had been built with funds provided by the late James Walker. After the acquisition of this property additional buildings were built thereon and also an additional

city block was acquired in fee simple by the Board of Managers upon which the south wing of the hospital is now located. The acquisition of the additional property was in fee simple without the restfictions set forth in the deed from the City and County.

After this conveyance was made the corporation created by the Private Law of 1901 took over the operation of the hospital. At the time of the institution of this suit none of the original members of the Board of Managers were still on the Board and no member of the City or County government is now a member of the Board or in any way in charge of the affairs of James Walker Memorial Hospital. The corporate charter gives the Board of Managers the absolute power to manage the hospital and to pass all rules and regulations necessary therefor, and since its inception the hospital has been operated, without interference or control by the City of Wilmington or New Hanover County, by its own self-perpetuating Board of Managers which have a separate corporate existence.

As was stated above, the Act of 1901 which chartered the hospital provided for funds in the annual amount of $8,000 from the City (40 percent) and County (60 percent) to maintain it. Subsequently additional acts were passed by the legislature to provide for maintenance as follows:

The Private Act of 1907, Chapter 38 of the North Carolina General Assembly, provided that annual appropriations could be made from public funds of the City of Wilmington and the County of New Hanover in order that the hospital be run in an efficient manner. The Public-Local Act of 1915, Chapter 66, provided that the appropriation for the support of the James Walker Memorial Hospital should be contributed and paid in equal proportions, one-half by the City and one-half by the County, and should not be less than an annual amount of $15,000 by said City and County. The Public-Local Act of 1937, Chapter 8, pro-

vided that a minimum annual appropriation of $50,000 would be necessary to give proper medical and hospital attention to the indigent sick and afflicted poor of the City and County, and said Act authorized and directed the City and County to make such minimum appropriation to enable the hospital to properly care for the indigent sick and afflicted poor and to renew its facilities and make additions to its physical plant. The Public-Local Law of 1939, Chapter 470, authorized the City and County to enter into contracts with the James Walker Memorial Hospital and to appropriate annually a sum not to exceed the amount of $25,000 each and authorized, if necessary, an additional tax levy. The Session Laws of 1951, Chapter 906, provided for contributions of the City and County to the James Walker Memorial Hospital to be on a per diem basis for the indigent sick and afflicted poor of said City and County. Pursuant to all of the above statutes, the City of Wilmington, North Carolina, and the County of New Hanover made payments to the hospital up to the year 1951. In this latter year the provisions of the Act of 1901 relating to financing the hospital and all subsequent acts were declared unconstitutional by the Supreme Court of North Carolina in *Board of Managers* v. *Wilmington*, 237 N. C. 179, 74 S. E. 2d 749. Since 1951 funds have been paid to the hospital by the City and County under contract pursuant to Article 14A of Chapter 153, General Statutes of North Carolina, enacted in 1953. The amounts so paid are as follows:

Year	Receipts City of Wilmington	Receipts County of New Hanover	Total	Other Receipts	Total All Cash Receipts
1952	$ 1,666.71	$22,482.89	$24,149.60	$ 897,912.18	$ 922,061.78
1953	None	21,672.75	21,672.75	952,847.27	974,520.02
1954	26,118.31	34,749.01	60,867.32	1,021,036.01	1,081,903.33
1955	12,945.67	33,339.73	46,285.40	1,034,859.40	1,081,144.80
1956	23,675.33	41,129.03	64,804.36	1,163,598.98	1,228,403.34
1957	1,738.00	58,533.05	60,271.05	1,352,238.51	1,412,509.56

At the present time the City does not have a contract with the hospital and in no way is a source of revenue for the same. The County, however, continues to pay according to contract for the care of indigent patients. The history of this contract and its terms are as follows:

On May 6, 1957, the County of New Hanover requested to be quoted the rates under which James Walker Memorial Hospital would undertake the care of certified indigent patients. On May 15, 1957, the hospital furnished the County of New Hanover with the following proposal:

> "The hospital will accept certified indigent patients for a per diem cost of $16.00. Of course, the County in its payment may deduct the $3.00 which the hospital will receive from other agencies for MCC (Medical Care Commission) cases, or $1.00 a day for SS (Social Security) cases.
>
> "In 1954 the hospital's per diem cost was $15.15 and the indigent care cost to the County was set at $15.00. In 1955 the hospital's per diem cost was $16.40, and in 1956 it was $17.60 not including depreciation. The average per diem cost for North and South Carolina hospitals in a category with this hospital was approximately $18.00 to $19.00.
>
> "In view of the data above, the Hospital Board of Managers feels that this rate is reasonable and will meet with your approval."

This proposal was accepted by the County and certified welfare patients are presently treated at a per diem cost of $16.

On March 19, 1955, the plaintiffs applied for "Courtesy Staff" privileges in the James Walker Memorial Hospital. The sole privileges of members of the "Courtesy Staff" is that they are allowed the use of private rooms and pay

wards for their patients. Charity patients who are certified by the County are not treated by the "Courtesy Staff" members, and the "Courtesy Staff" members receive no part of the public funds which are paid for the per diem cost of treatment of charity patients. For the purpose of the instant motion, it is conceded that the applications for the "Courtesy Staff" privileges were properly made and that the plaintiffs were denied the same solely on account of their race.

On the above facts the defendants move to dismiss contending that the denial of "Courtesy Staff" privileges to the plaintiffs by the hospital is not State action within the purview of the Fourteenth Amendment, and, consequently, the litigation contains no basis for federal jurisdiction. The ultimate question, therefore, is whether the action of the hospital constituted public or private conduct. If the hospital is a private corporation, then its conduct is also private.

At the outset, it is manifest that the fact that the hospital's purpose is to promote the public interest and convenience in providing a place for the sick and afflicted does not render the hospital a public corporation. This distinction is clearly set forth in the concurring opinion of Story, *J.*, in the case of the *Trustees of Dartmouth College* v. *Woodard*, 4 Wheat. 518, 4 L. Ed. 629:

> "When, then, the argument assumes, that because the charity is public, the corporation is public; it manifestly confounds the popular, with the strictly legal, sense of the terms * * * When the corporation is said, at the bar, to be public, it is not merely meant that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustee of the public interest, to regulate, control and direct the corporation, and its funds and

its franchises, at its own will and pleasure. Now such an authority does not exist in the government, except where the corporation, is in the strictest sense, public; that is, where its whole interests and franchises are the exclusive property and domain of the government itself."

And further:

"A hospital founded by a private benefactor is, in point of law, a private corporation, although dedicated by its charter to general charity. • • • It was indeed supposed at the argument, that if the uses of an eleemosynary corporation be for general charity, this alone would constitute it a public corporation. But the law is certainly not so."

Rather than the nature of its purpose or objective, the legal test between a private and a public corporation is whether the corporation is subject to control by public authority, State or municipal. *Mitchell* v. *Boys Club of Metropolitan Police*, D. C., 157 F. Supp. 101.[1] The essence of this concept is that the present ability to control carries with it the responsibility for the present action of the which can be controlled.

When considering the ability to control, it must be noted that it is a composite of elements, for there are as many elements of control as there are qualities and quantities in the controlled subject. The elements must be viewed in

[1] A private hospital is defined in 41 C. J. S. Hospitals §1, as one "Founded and maintained by private persons or a corporation, the state or municipality having no voice in the management or control of its property or the formation of the rules for its government." By implication, The Courts of North Carolina recognize this test in *Carolina-Virginia Coastal Highway* v. *Coastal Turnpike Authority*, 237 N. C. 52, 74 S. E. 2d 310.

their relationship to each other and as part of a sum total, and for this reason each case must be viewed on its merits.[2]

[2] For this reason the Court will not attempt to discuss and compare at length the ...s of *Kerr* v. *Enoch Pratt Free Library of Baltimore City*, 4 Cir., 149 F. 2d 212, *Norris* v. *Mayor and City Council of Baltimore*, D. C., 78 F. Supp. 451, with the ...ant litigation. A summary comparison, however, is as follows:

	Enoch Pratt Library	*Maryland Institute*	*James Walker Memorial Hospital*
...ue of plant ...ned and used	None	$500,000 (Cost)	$756,000 (depreciated value)
...ue of plant ...ned by City ...t used by	Over $4,000,000	Leased for $500 per year of one city building which for commercial purposes would rent for $12,000 a year	Land valued at $54,000. City and County have reverter only if abandoned by hospital in one-half of property
...nual gross in...me from prop...ty or activities	$6,000 to $8,000	$184,000	$1,412,509.56—1957
...nual sums ...aid by City ...d State	Over $800,000	$42,500 (under contract for scholarships)	$60,271.05 (Paid under contract for indigents for services rendered)—1957
...roportion ...f public funds ...ceived to total ...udget	99%	About 23% (under contract)	About 4.6% (under contract)
...blic status of ...mployees	Included in municipal employees retirement system	None	None
...ntrol of disbursements by ...ity	Made through City Bureau of Control and Accounts on vouchers submitted by Trustees	None	None
...lary checks for ...mployees	Issued by City Payroll Officer	None	None
...lary of em...ployees	Conform to City salary schedule	None	None
...ontrol of Budget	Submitted to municipal budget authorities	None	None

Past contacts with connotations of control have no importance other than to explain the existing relationship. In short, the present ability to control must be determined by considering the sum total of all existing relationships between the corporation and the State.

Turning to an examination of the elements of State control as they extend to the hospital in the case at bar, it is noted that the charter of the corporation here involved was granted by the General Assembly of North Carolina pursuant to private act. This act created the corporation with its own Board of Managers and with full power and authority to set forth its own rules and regulations. The express purpose of the act was to remove this corporation and the hospital which it was to operate from the politics which are connected with local City and County governments. No element of control over the corporation was retained in either the City or the County after the initial appointment of the Board of Managers. Inasmuch as no member of the Board of Managers as originally appointed is presently connected with the hospital (all of these having been replaced by persons who were elected by the self-perpetuating board), this element of control has long since expended itself. The hospital receives at present from the County only 4.27% of its income, and this money is received by virtue of contract for services performed. For the past six years money so received has amounted to an average of 4.05% of total revenue. The County has no voice in how such money shall be spent. The hospital was not created for political purposes, nor endowed with political powers. It is not an instrument of the government for the administration of public duties.

The fact that one-half of the property presently owned by the hospital was originally owned by the City and County has no bearing on present control. This Court knows of no authority which holds that the bona fide conveyance to a

private corporation of public lands in turn makes a private corporation an agency of the State or creates the status of a public corporation. Indeed the conveyance was in good faith and for the very purpose of removing the City's and County's control with regard to the property. The deed clearly accomplished this purpose. The only way the City and County can claim an interest in the property or any control over the property would be in the event that the hospital ceased to be used for the care of the sick and afflicted of New Hanover County. The purpose and effect of the deed is to carry out the intent of the charter to create a public charity but not a public corporation. The City and County may eventually regain the property, but this possibility is distinctly within the control of the hospital corporation. Only the latter possesses initiative with regard to the same.

The past contributions to the hospital by the City and County under the acts of the legislature, which were later declared invalid in *Board of Managers* v. *Wilmington*, *supra*, are not sufficient to convert the hospital into a public corporation. *Mitchell* v. *Boys Club of Metropolitan Police*, *supra*. In this regard the following comment of Judge Chesnut in *Norris* v. *Mayor and City Council of Baltimore*, D. C., 78 F. Supp. 451, 460, seems appropriate:

> "Counsel for the plaintiff advances a new and far-reaching proposition not within the principle of the Pratt Library Case. The contention is that whenever the State or Baltimore City as a municipal agency of the State, advances money to a private corporation of an educational nature in an appreciably substantial amount, which thereby becomes mingled with other general funds of the institution, that action of the institution or City thereby becomes State action within the scope of the 14th Amendment. No authority is

cited for this proposition and I know of none. In my opinion it is untenable."

In addition the past contributions do not have any relative bearing on the matter of the control of the hospital; and the possibility of any such contributions in the future has been foreclosed by judicial decision of the State of North Carolina.

In summation, the only links between the State of North Carolina and the hospital are these: 1.) the City and County have a reverter in one-half of the hospital's land should the same fail to be used for hospital purposes; 2.) the County pays at a rate provided by contract for the treatment of indigent patients. These factors do not carry with them such control as to render the hospital a public corporation. The Court concludes, therefore, that the plaintiff is not entitled to the declaratory judgment prayed for because the act of discrimination did not constitute "State action." It results that for the lack of jurisdiction the complaint must be dismissed, and it is so ordered.